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No. 90-1400

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM M. BENNETT; CONWAY H. COLLIS; ERNEST J. DRONENBURG, JR.; PAUL CARPENTER; GRAY DAVIS; CINDY RAMBO; JOHN GIBBS; LUCIAN KHAN; SHEILA J. GUSTIN,
PETITIONERS,

v.

DIRECT MARKETING ASSOCIATION, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that under California law Respondent did not have a "plain, speedy and efficient remedy" in California state courts because of the uncertainty of such a remedy and, therefore, that the Tax Injunction Act, 28 U.S.C. § 1341, does not bar federal court jurisdiction.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Respondent Direct Marketing Association, Inc. was the plaintiff-appellant below. Respondent does not have any parent or non-wholly-owned subsidiary company required to be listed separately pursuant to Rule 29.1. Petitioners, defendants-appellees below, are William M. Bennett, Conway H. Collis, Ernest J. Dronenburg, Jr., Paul Carpenter, Gray Davis, Cindy Rambo, John Gibbs, Lucian Khan, and Sheila J. Gustin, all elected members, and officials, of the State Board of Equalization, State of California.

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent, Direct Marketing Association, Inc. ("DMA"), submits this brief in opposition to the Petition for a Writ of Certiorari filed by Petitioners William M. Bennett, *et al.* Petitioners seek review of a unanimous decision by the U.S.

Court of Appeals for the Ninth Circuit (Petition Appendix ("App."), A10-A25) reversing a judgment entered by the U.S. District Court for the Eastern District of California.(App. A9.) For the reasons set forth below, DMA urges this Court to deny the Petition.

STATEMENT OF THE CASE

DMA, a not-for-profit corporation, is the largest and oldest trade association representing companies involved in direct-to-the-consumer mail advertising and marketing. DMA's membership totals more than 3200 firms across the United States and in 40 foreign countries. A majority of DMA's members are direct marketers located outside of the State of California.

On July 18, 1988, DMA, on behalf of its non-California members, brought the instant lawsuit against Petitioners seeking prospective relief pursuant to 42 U.S.C. § 1983, as well as attorneys' fees under 42 U.S.C. § 1988. DMA alleged that Petitioners had violated its members' constitutional rights by demanding that these members collect and remit the California use tax. Such demands were made although these DMA members had no physical presence in California and communicated with their customers solely by means of the instrumentalities of interstate commerce.[1]

[1] DMA's complaint is founded upon the constitutional doctrine of "nexus" articulated by the U.S. Supreme Court in *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). As the court of appeals below noted, in *dictum*, the Court in *National Bellas Hess* held that

> a state may not impose use tax collection responsibilities on a retailer that maintains no physical facilities or employees within the state, but, instead, limits its business activities to the distribution of catalogs through the United States Mail and then delivers its goods by parcel post and interstate common carriers.

(App. A14.)

On October 20, 1988, Petitioners moved to dismiss DMA's complaint on the grounds that (1) Petitioners are immune from suit under the Eleventh Amendment; (2) the Tax Injunction Act, 28 U.S.C. § 1341, divested the district court of jurisdiction; and (3) DMA lacked standing to prosecute its claims. The district court concluded that the Tax Injunction Act barred federal court adjudication of DMA's case.

The district court rejected DMA's argument that the Tax Injunction Act did not bar federal court jurisdiction because DMA's members lacked access to California state courts to resolve their claims.[2] Rather, it held that these members could wait to avail themselves of a suit for refund under California Revenue and Taxation Code ("Code") § 6902 after either (1) voluntarily collecting and remitting the use tax or (2) disobeying Petitioners' collection demands and awaiting a tax assessment (a "Notice of Determination"). (App. A5.) The district court held that while no state court remedy was actually available to DMA's members, this was a "question of ripeness" which "has no relevance to the issue of the ultimate availability to plaintiff's members of the remedy provided by the State in its courts." (App. A7.)

On October 23, 1990, the court of appeals reversed the district court's order of dismissal. The court of appeals held that it was, at best, uncertain whether any state court remedy was available to DMA members who had received use tax collection demands from Petitioners.

The court of appeals found it doubtful whether these members could file a suit for refund if they simply collected and remitted the use tax, since Code § 6902 permitted such suits only by "taxpayers." "[S]ince the use tax is levied on the con-

[2] The Tax Injunction Act, 28 U.S.C. § 1341, provides as follows:

> The districts courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.

sumer and the retailer is a mere collector of the tax, retailers may not seek a refund of the tax they collect and pay to the Board." (App. A16-A17.) The court of appeals quoted specifically from *Bank of America* v. *State Board of Equalization*, 209 Cal.App.2d 780, 799, 26 Cal.Rptr. 348, 359-60 (1962):

> [T]he use tax is a tax levied upon the purchaser. It is not a tax on the retailer; nor does it shift to him because he has the duty to collect it from the consumer . . . the liability of the retailer is not, therefore, for the use tax itself but for an *amount equivalent* to it because of his default in his duty as a collection agent. *The taxpayer is the person ultimately liable for the tax itself, and not the person who pays the tax liability.*

(App. A18-A19; emphasis added by court of appeals.)

The court of appeals declined to accept the claim that the taxpayer/non-taxpayer distinction was immaterial. (App. A19.) There simply had been no cases where a retailer had collected the use tax and then successfully commenced an action to recover the use tax pursuant to Code § 6902. The court of appeals also observed that

> DMA's concern that its status as a non-taxpayer renders precarious its right to seek a tax refund finds ample support in other cases. For example, with respect to the sales tax, California courts have held that the purchaser is precluded from seeking a refund because he is not considered the 'taxpayer.' *See State Board of Equalization* v. *Superior Court*, 111 Cal.App.3d 568, 570, 169 Cal.Rptr. 3, 4 (1980).

(App. A20.)

Moreover, the court of appeals based its decision on the fact that, when the Code was adopted, a clause in the predecessor statute clearly and explicitly providing a remedy for "retailers who voluntarily paid use taxes" was *deleted* (App. A22). As the court of appeals observed, "[n]o similar provision providing the retailer the right to sue for a refund in use tax cases was incorporated into the new tax code." (App. A22-A23.)

Finally, the court of appeals held that a suit for refund was not otherwise available because DMA's "members have not received [tax] determinations." (App. A17.) The court of appeals specifically rejected the notion that this was merely a question of "ripeness" since DMA members could refuse to obey Petitioners' demands and file suit after receiving a tax assessment, including an assessment of penalties and interest. The court of appeals observed that "[f]ailure to file use tax returns by DMA's members exposes them to the risk of substantial penalties, and whether or not the state will issue a determination becomes a matter of speculation." (App. A24-A25; footnote omitted.)

SUMMARY OF ARGUMENT

This petition involves only a question of construction of a California statute. Neither a constitutional issue nor a conflict among circuits is raised by Petitioner in its brief.

The court of appeals applied the Tax Injunction Act in the manner expressly prescribed by this Court. There is no legitimate claim that the court of appeals applied an improper legal standard in this case. Rather, Petitioners merely attempt to challenge the court of appeals' valid interpretation of California statutes, legislative history, and case law regarding the unavailability of a state court remedy for DMA's members and seek to have this Court rewrite the California tax code.

Petitioners' arguments boil down to the claim, without any substantiation, that the California tax code is "at least susceptible" to an interpretation that DMA's members have a state court remedy. (Petition at i.) However, the test under the Tax Injunction Act is not whether a state tax statute is "at least susceptible" to the unsupported interpretation proffered by Petitioners in their brief. To the contrary, the appropriate analysis is whether the state court remedy "is uncertain"; this was the precise test applied by the court of appeals. *See, e.g., Franchise Tax Board of California* v. *Alcan Aluminum Ltd.*, ___ U.S. ___, 110 S.Ct. 661, 667, 107 L.Ed.2d 696 (1990). The court of appeals carefully analyzed California law and concluded there was great uncertainty as to whether DMA's members had a remedy in state court.

There is no sound basis for revisiting the court of appeals' analysis of California law. In an effort to create the illusion of injustice below, Petitioners argue that this decision will "wreck havoc" on the California tax system since it will allow federal court intrusion into state tax matters. This claim of dire consequences is erroneous in several respects. First, as discussed below, the class of companies affected by the ruling is limited; it would only affect those out-of-state companies who received improper use tax collection demands. Second, the mere fact of federal court involvement is not a valid reason to deny DMA members the only forum for raising their claims. Third, the California legislature is the proper body to remedy any perceived adverse consequences by amending the tax code to provide retailers access to the California state courts to obtain a refund of use taxes collected and remitted to the state. This is only underscored by Petitioners' appeals to matters of public policy in their brief.

Petitioners also raise for the first time in this litigation the notion that "comity" precludes federal court jurisdiction. The Court has frequently stated that: "We do not address for the

first time in this Court an issue which the Court of Appeals has not addressed." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981). Moreover, the principle of comity can only be applied where there exists a state procedure to which the federal court can and should defer. As discussed above, there is no state court remedy available to DMA's members.

As set forth in the Statement of Facts, this case concerns Petitioners' repeated demands that out-of-state mail order firms collect and remit to Petitioners the California use taxes. These companies believed that Petitioners' demands were unconstitutional; however, they faced an agonizing decision under California law. On the one hand, if they obeyed the demands and began the expensive and administratively burdensome process of collecting and remitting the tax, they would have no right to raise their legitimate constitutional objections in state court, since, as the court of appeals found, Code § 6902 limits suits for refunds to "taxpayers." On the other hand, if these out-of-state firms declined to collect the tax, they faced the possibility of "substantial penalties" if the Board ultimately decided to issue a tax assessment against them, not the least of which would be direct liability for a use tax which was actually owed by their customers. (App. A24; footnote omitted.)[1] DMA, on behalf of its members, had no option but to proceed in federal court.

[1] The specter of a contingent and uncontestable liability of in excess of six percent gross sales (*i.e.*, the use tax, together with penalties and interest), plus possible exposure to criminal penalties, can mean the difference between a profit or a loss for DMA's members. Indeed, the accrued liability, over time and prior to the possible issuance of an assessment, could force companies out of business.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT BECAUSE THE SOLE QUESTION RAISED BY PETITIONERS RELATES TO AN INTERPRETATION OF CALIFORNIA LAW CORRECTLY DECIDED BY THE COURT OF APPEALS; THE COURT OF APPEALS DECISION PERMITS FEDERAL COURT JURISDICTION IN ONLY A LIMITED NUMBER OF CASES.

A. The Court of Appeals Used The Proper Standard, As Set Forth In Decisions of This Court, To Determine That The Tax Injunction Act Did Not Divest The District Court Of Jurisdiction.

The court of appeals properly applied the precedent of this Court in determining that DMA members did not have a "plain, speedy and efficient" remedy in the California state courts. This conclusion was based on the fact that California law was sufficiently uncertain as to "whether [DMA's members] have a remedy available to them." (App. A17.)

As this Court has stated, "a remedy that is uncertain or speculative is not adequate to bar federal jurisdiction." *Franchise Tax Board of California* v. *Alcan Aluminum Ltd.*, ___ U.S. ___, 110 S.Ct. 661, 667, 107 L.Ed.2d 696 (1990).[4] Indeed, it is well-established that the availability of a state remedy may be so uncertain, unclear, or speculative that it

[4] In *Alcan*, the Court refused to find the state court remedy "uncertain" since there was no authority for the plaintiff's claims that California state courts would not adjudicate foreign commerce clause issues; plaintiff itself clearly had a remedy in state court. In the instant case, DMA is not alleging that certain of its arguments might not be addressed by the state court. Rather, there is great uncertainty, on the basis of the Code, legislative history, and analogous cases, whether they could proceed in state court at all.

not constitute a "plain" remedy under the Tax Injunction Act. See *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 76, 97 S.Ct. 219, 224, 50 L.Ed.2d 227 (1976) ("uncertainty concerning a state's remedy may make it less than 'plain' "); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105-06, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944) (district court had jurisdiction due to "the uncertainty regarding the adequacy of the Connecticut remedy").

Petitioners attempt to eviscerate this clear standard by claiming that, if California law "is at least susceptible" to an unsupported interpretation that DMA members might have a remedy, the district court should be divested of jurisdiction. (Petition at i, 19.) Petitioners cite to no cases enunciating this novel test. The only relevant Supreme Court case cited in the Petition is *Franchise Tax Board of California* v. *Alcan Aluminum Ltd.*, *supra*, which, as noted above, reiterates the rule applied by the court of appeals that uncertainty of a state court remedy may defeat the application of the Tax Injunction Act.

B. Petitioners Provide No Basis For Their Request For A Ruling From This Court That The Court of Appeals Incorrectly Interpreted California Law.

The thrust of Petitioners' claims is that the court of appeals incorrectly interpreted California law regarding whether "a plain, speedy and efficient remedy" is provided to DMA's members. There is no valid reason to revisit the court of appeals' careful and correct statutory analysis.

Petitioners argue that the tax code "is at least susceptible" to an interpretation that a remedy might be available to DMA's members, and that this should be sufficient to divest the federal courts of jurisdiction. However, Petitioners fail to cite a single case that "shows that a non-taxpayer retailer who voluntarily remits use taxes to the Board can sue for a refund." (App. A23.)

As the court of appeals recognized, every case cited by Petitioner involved a retailer who had been issued a tax assessment by the Board. (App. A19.) For example, in *Holland Furnace Co.* v. *State Board of Equalization*, 177 Cal.App.2d 672, 2 Cal.Rptr. 606 (1960), the plaintiff had received an assessment. Moreover, the court in *Holland* applied an early version of Code § 6902, which did not limit remedies to "taxpayers"; the current statute limits the litigable claims to taxpayers. Finally, *Holland* involved solely the question of whether "action by the Board under Article 2 [deficiency determination] or Article 3 [determination for failure to file a return] to assert a deficiency extends the time within which the taxpayer must initiate proceedings to recover taxes." 177 Cal.App.2d at 608.

In addition, Petitioners' "interpretation" of the Code flies in the face of its legislative history and pertinent state and federal court decisions. For example, Petitioners neglect to mention that the 1941 amendment to the tax code deleted an express right of action for retailers who voluntarily collect the use tax. (App. A22.) They also fail to address analogous decisions in the sales tax area, which hold that customers cannot sue for sales tax refunds because the retailer is the "taxpayer." (App. A20.) The Tax Injunction Act was never intended to leave an aggrieved party out in the cold on the basis of Petitioners' unsupported speculation as to the mere possibility of a state court remedy.[5]

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[5] In a last ditch effort to discredit the court of appeals decision, Petitioners allege that the court of appeals erroneously reported the facts of *Ashton* v. *Cory*, 780 F.2d 816 (9th Cir. 1986) (Kennedy, J.), by stating that the vacation trust (the plaintiff) was required to file a tax return (Petition at 18). Whether tax returns are filed is immaterial to the question under the Tax Injunction Act. The court in *Ashton* correctly applied the standard that "[a] state remedy is not plain, within the meaning of the Tax Injunction Act, if there is uncertainty regarding its availability or effect." 780 F.2d at 819.

C. Petitioners' Claim Of The Purported Vast Economic And Legal Ramifications Of The Court of Appeals Decision Is Not Supported By Either The Law Or The Record; The Court Of Appeals' Decision Only Applies In A Limited Number Of Circumstances As Envisioned By The Tax Injunction Act.

Petitioners claim that the court of appeals' finding of federal court jurisdiction will have a profound impact on the state tax system. (Petition at 7-9.) The effect of the court of appeals decision, however, is limited because only a small number of companies will be able to maintain lawsuits in federal court. The Tax Injunction Act itself presupposes that a certain number of cases involving state taxes will be adjudicated in the federal courts where, as here, there is no plain, speedy and efficient state remedy.

First, the court of appeals' decision only applies to those out-of-state companies that have no presence in California but are faced with improper use tax collection demands. The vast majority of retailers subject to the authority of Petitioners are in-state retailers who are responsible for paying *sales* tax; they have no use tax collection liabilities. Since such retailers are directly liable for the California sales tax on their sales, they are "taxpayers" with a remedy under Code § 6902. *See, e.g., Javor* v. *State Board of Equalization*, 12 Cal.3d 790, 117 Cal.Rptr. 305, 527 P.2d 1153 (1974) (refund suit for sales taxes paid is not available to customer since the retailer is the "taxpayer").

Second, California court decisions reflect that the tax code provides a remedy in the vast majority of circumstances. *See, e.g., Redding Ford* v. *California State Board of Equalization*, 722 F.2d 496, 497 (9th Cir. 1983) (tax remedy available where retailer receives a determination for sales and use taxes); *Bank of America* v. *State Board of Equalization*, 209 Cal.App.2d 780, 799, 26 Cal.Rptr. 348, 359-60 (1963). Isolated cases in-

volving demands on out-of-state retailers simply do not represent a cognizable threat to the California tax system.

Finally, there is no evidence in the record to support Petitioners' ominous charge that the court of appeals decision has "vast economic and legal ramifications" for the state. (Petition at 7.) Petitioners merely speculate that certain unscrupulous retailers with "real or imagined legal challenges" will resort to federal court to challenge use tax collection demands. Petition at 9.* Given the narrow issues involved in this case, there is no credible basis for Petitioners' attempt to inflate the significance of this case to the State of California. It is beyond dispute that the Tax Injunction Act was never meant to divest the federal court of jurisdiction where no state court remedy is available, even if the result is federal court involvement in state tax matters. *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 515 n.19, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981) (there must be an available state remedy which "provid[es] the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax") (citations omitted).

*DMA's well-founded case should not be forced to suffer because of the possibility that some firms may press frivolous claims in federal court. DMA's case against the Petitioners is strongly supported by a long line of Supreme Court precedent holding that an out-of-state retailer cannot be compelled to collect and remit a state use tax unless it has a physical presence in the state. *See, e.g., National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 559 (1977); *National Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753, 756 (1967); *Miller Brothers Co.* v. *Maryland*, 347 U.S. 340 (1954). To the extent that other firms might file groundless lawsuits, there are sufficient mechanisms under the Federal Rules of Civil Procedure to deal with such parties (including motions to dismiss).

D. Even If The Decision Below Will Involve Petitioners In Additional Federal Court Litigation, It Is Up To The California Legislature To Amend Its Tax Laws To Provide A Remedy For Out-Of-State Retailers Who Have Received Use Tax Collection Demands.

Petitioners in essence ask this Court to rewrite the Code to provide a new remedy for DMA members in order to avoid federal court litigation of this case. (Petition at 9.) This is a matter for the California legislature and not the courts. Thus far, the legislature has *refused* to provide such a right of action for DMA members.

In 1941, the legislature amended Code § 6902 to *remove* the provision expressly providing a suit for refund remedy to retailers voluntarily collecting and remitting the use tax. As the court of appeals held: "No similar provision permitting a retailer the right to sue for a refund of use taxes was incorporated into the new tax code." (App. A23.) Certainly, the legislature, after careful consideration of all of the questions raised by Petitioners, should decide whether it wishes to reconsider its decision in 1941 not to provide for such a remedy to non-taxpayers such as DMA members.

E. Respondent's Members Would Have No Forum To Raise Their Valid Constitutional Claims If The Federal Court Were Divested of Jurisdiction; The Decision To Proceed In Federal Court Was The Only Rational Choice Available To DMA.

In their eagerness to obtain the dismissal of this case, Petitioners overlook the fact that there is great uncertainty whether DMA's members will be able to prosecute their claims in state court. That concern, however, is central to the issue of federal court jurisdiction.

This case was triggered by Petitioners' demands that out-of-state direct marketers collect and remit the California use tax.

These companies believed that Petitioners' demands were unconstitutional; however, they faced a difficult decision under California law. On the one hand, if they obeyed the demands and began the expensive and administratively burdensome process of collecting and remitting the tax, they would have no right to raise their legitimate constitutional objections in state court, since Code § 6902 limits suits for refunds to "taxpayers." On the other hand, if these out-of-state firms declined to collect the tax, they faced the possibility of "substantial penalties" if the Board ultimately decided to issue a tax assessment against them, not the least of which would be direct liability for a tax owed by their customers (App. A24; footnote omitted). DMA, on behalf of its members, had no option but to proceed in federal court.

F. Petitioners Have Waived The Right To Raise Principles Of Comity In Support Of Their Petition And, In Any Event, Principles Of Comity Do Not Bar Jurisdiction.

Petitioners raise for the first time in this case the notion that principles of comity should have barred the district court from adjudicating DMA's case. This Court has frequently stated that: "We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 558 (1981). Petitioners offer no reason to depart from this well-established rule.

Further, principles of comity only block federal court jurisdiction in favor of state remedies "provided of course that those remedies are plain, adequate and complete." *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 116, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981) (footnote omitted). The Supreme Court was quick to caution that

> [w]e discern no significant difference, for purposes of the principles recognized in this case [comity], between remedies which are "plain, adequate, and complete," as that phrase has been used in articulating the doctrine of equitable restraint, and those which are "plain, speedy and efficient," within the meaning of § 1341 [the Tax Injunction Act].

454 U.S. at 116 n.8 (citations omitted). Therefore, the very fact that California law provides no remedy for DMA's members is as much a defense to the "comity" argument advanced by Petitioners as is it to the application of the Tax Injunction Act.

CONCLUSION

This is simply not a case warranting Supreme Court intervention and review. It involves a decision by the U.S. Court of Appeals for the Ninth Circuit applying the Tax Injunction Act in accordance with settled Supreme Court precedent. The Petition should be denied.

Respectfully submitted,

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